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THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 34,766

EDGAR BOHN,

vs. *Appellant,*

MRS. ELIZABETH WEST BOHN,

Appellee.

Statement of Case.

This suit originated in the Chancery Court of Harrison County by a bill of complaint filed by appellee Mrs. Elizabeth West Bohn, surviving widow of Henry Bohn, deceased, against Edgar Bohn, appellant, one of the children of the said Henry Bohn, to recover from him a large sum of money claimed to be due to her, for the use and occupation of the homestead property of the said decedent, covering a period of something more than ten years. However, the case was transferred to the Circuit Court of Harrison County, Mississippi, which is a law court. The pleadings were reformed to conform to the practice in that court, and were amended in several particulars, so that it proceeded thereafter, as a suit to recover the sum of $10,780. for back rent upon a portion of the homestead property, which appellant had occupied as a store and residence (See T. of R. 45-48).

There was a trial of the cause, and verdict rendered by the jury, in favor of appellee in the sum of $2,250. together with costs (T. of R. 80-81).

Thereafter, the case was appealed to the Supreme Court of the State of Mississippi, and the judgment of the lower court was affirmed, see copy of decision of the court hereto attached. Thereupon, appellant filed elaborate suggestions of errors to this decision, and therein, set up and argued at length and fully, that the decision was contrary to the Fourteenth Amendment to the United States Constitution. However, after due consideration, the suggestion of errors were overruled.

Theory of the Case.

It is considered by appellant that the holding of the court to the effect that the surviving widow of Henry Bohn, deceased, had a life estate in the homestead property, owned and occupied by him at the time of his death, was in violation of the Fourteenth Amendment of the Federal Constitution, in that the life estate of the surviving spouse had been abolished by Section 1170 of the Code of 1880, which is as follows:

> "Dower and curtesy, as heretofore known, are abolished."

In lieu thereof, by Section 1277 of the same code, it was provided:

> "The property exempted by law from sale under execution or attachment, shall, on the death of the husband or wife owning it, descend to the survivor of them, and the children of the decedent, as tenants in common."

The above provision has been brought forward in all subsequent codes of the State, and now appears in the Code of 1930 as Section 1410 thereof. And by Section 1404 of the Code of 1930, which is 1171 of the Code of 1880, it was provided:

> "Where the deceased husband shall leave a child or children by a former marriage, or descendants of said

child or children, his widow shall have a child's part of his estate in fee simple."

Now Section 1765 of the Code of 1930, which is Section 1248 of the Code of 1880, provides that the homestead of a person, being head of a family, actually occupied by him as a residence, and the land and buildings thereon, shall be exempt from sale under execution or attachment. Where it is situated in the country it is not to exceed 160 acres and where it is within a municipal corporation, it is to embrace the property, lot or lots actually occupied, but in either case not to exceed in value, $3000.

By Section 1412 of the Code of 1930, which appears for the first time as Section 1553 in the code of 1892, the surviving widow, is given a veto power over the sale or partition of the homestead property during her life or widowhood.

This is the same power she had while the husband lived, over the sale or encumbrance of the homestead, the exempt property, recognized under the statutes, for many years.

It is therefore the contention of appellant that he has been deprived of a valuable property right contrary to law, which is a violation of the Fourteenth Amendment to the Federal Constitution, in that the decision of the court has re-enacted the old laws of dower and courtesy, which had been abolished by the legislature in 1880; and has substituted these abolished laws in the face of the provisions of Sections 1404-1410 and 1412 of the laws of Mississippi as appears in the code of 1930, which governs this case.

The decision of the court, if permitted to stand, has made appellant liable to appellee for a large sum of money for back rents claimed to be due for the use and occupation of no more than belonged to him by inheritance under the laws quoted, and by purchase from his sister, the sole and

only other child of said decedent, amounting to an undivided two-thirds interest in said property.

In addition to that, the court has ordered appellant to surrender the possession of the property entirely to the widow, which will deprive him of his rightful use of his two-thirds interest in the property. The expectancy of the surviving widow appears to be for a number of years to come. The value of the property itself, as testified to by appellee, is around $12,000.

There were no children of Henry Bohn by his marriage to appellee; there were two children by the former marriage of Henry Bohn, the mother of appellant.

Respectfully submitted,

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APPENDIX "A".

IN THE SUPREME COURT OF MISSISSIPPI

No. 34,766

(Opinion rendered January 12, 1942.)

In Banc.

EDGAR BOHN

vs.

MRS. ELIZABETH WEST BOHN.

ALEXANDER, *J.*

Appellee is the widow and appellant is the son of H. N. Bohn, deceased. The widow filed her bill to compel an accounting for rents upon such part of the homestead as had been occupied, over her protest, by appellant. The suit was transferred to the circuit court, and the declaration sought reasonable rental of such portion so occupied, and ejectment. A peremptory instruction upon the issue of liability was granted to the widow, and judgment for rents and ejectment was entered upon the verdict of the jury.

The question immediately presented is whether a widow over sixty years of age is entitled to the exclusive use and occupancy of the homestead during her life as against other adult heirs of the deceased owner thereof. Appellant's contention carefully elaborated, that the widow and children inherit in equal parts, the homestead property as tenants in common, needs no support. The narrow inquiry is the extent of the widow's rights therein during her life, or otherwise expressed, the right of the other heirs during this period.

Since the Code of 1892 and under Code of 1930, Sections 1410 and 1412, the widow takes a child's part in the fee with the right of undisturbed possession, or use of the homestead during her lifetime. This change did not re-

strict, but enlarged the rights of the widow. What then is the extent of her rights in the homestead during her life? This inquiry necessarily involves an examination of the rights of the other heirs as tenants in common. Ordinarily, tenants in common are seized *per my et per tout*, and the right of possession is in common. Yet, if the heirs were permitted to exercise their rights of possession as against the homestead, the widow could never enjoy its "undisturbed use and possession." If each was allowed to receive his share of the rents and profits during the life of the widow, she would receive no more than a child's part and Section 1412 would be rendered futile. If the homestead cannot be partitioned during the widow's life, it would be inconsistent to allow the profits or rents from the homestead to be divided. Martin *v.* Martin, 84 Miss. 553, 36 So. 523; Moody *v.* Moody, 86 Miss. 323, 38 So. 322; Stevens *v.* Wilbourn, 88 Miss. 514, 41 So. 66; Miers *v.* Miers, 160 Miss. 746, 133 So. 133.

To what extent must it be undisturbed? In the instant case, involving a two-story homestead property, the appellant, together with his own family, is in possession of the entire lower floor, and part of the second floor. Assuming the existence of equal rights of possession and the presence of adult children, each could make equal claims, attaining results which would pass beyond absurdity into cruelty. Were the home a modest one-room hovel, three children could, by demanding each his respective corner, relegate the widow to the remaining and least desirable nook, there to ponder the havoc wrought through the mockery of a statute which, despite its beneficent assurance, had been found inadequate, to stem the tide of dismemberment. To continue, in the face of this section, to define a common interest in terms of a common right of possession and use is to denude the section of any purpose of efficiency. The plain truth is that the incidents of cotenancy involve disadvantages to which the law was unwilling for the widow to be exposed. Such conclusion is reached not by a strained, but by a literal construction of the benefits and burdens of cotenancy, which appellants insist should still be applied. In adjudging its incompatibility with the purpose of the

section, it should be sufficient to recall that where tenancies in common exist "none knoweth his own severalty and therefore they will occupy promisc-ously" Bl. Com. Vk. 2, ch. 12 p. 191. When it is considered as there stated that in such estate, "no man can certainly tell which part of his own", there would be great hazards that the widow, but for our statute, would enjoy the homestead at the behest of the heirs who could, to an oppressive degree, interfere with the widow's use and enjoyment thereof. Even as the land itself may not be partitioned while she lives, neither may her use thereof be divided.

Through Section 1412 the widow does know her own severalty. Her right to occupy the homestead is definite, and if her benefits and burdens were those of cotenancy, the section need not have been enacted. Since she may occupy the homestead without accounting for rents (Martin *v.* Martin supra), they may not do so. Again, since she is entitled to any rents therefrom Miers *v.* Miers supra), they are liable conversely for their use thereof.

Undisturbed possession must be defined,—not in terms of the forebearance or patience of the widow, but the terms of the legal right not to be subjected to the probability or possibility of a challenged dominion. The widow has the right to retain the homestead as it was during the husband's lifetime, by which test it is seen that she may remain its mistress even as he had been its master. Williams *v.* Williams, 111 Miss. 129, 71 So. 300; Miers *v.* Miers, 160 Miss. 746, 133 So. 133. The matter is not complicated by the fact that the deceased left children. Appellant, an adult business man, in far from necessitous circumstances, having purchased the interest of the sole remaining heir, is alone involved. In the first place, there are no minor or dependent children, and next, the quoted statutes deal not with the duty but with the right of the widow. Wherefore we are not confronted with the necessity of examining to what extent the rights of the appellee are modified, if at all, by any legislative purpose to conserve the property for the maintenance of the family. If, as insisted by appellant, the purpose of the statute was to preserve the homestead for the benefit and protection of the family as therefore, it

is a complete answer that none of the rights therefore existing prior to the husband's death, included the power to eject or disturb the widow or to demand either the homestead or its rentals. If Section 1412 could be so read as to vouchsafe to the heirs, and inch of privilege, it would be powerless to restrain invasion short of the mile of actual ouster. When viewed in the light of its effect upon the right of enjoyment which the statute seeks to conserve for the appellee, there has already been a virtual partition and an actual ouster pro tanto. If, as is seen in Martin *v.* Martin, 84 Miss. 553, 36 So. 523, the "widow cannot be compelled to partite or account for the user so long as it is 'occupied or used' by her", it must follow that others who so use or occupy it may be made to account to her. Since she is entitled to the use or rents therefrom, the use may not be taken by others, even the heirs, without liability for the rents. This construction is not merely forecasted by the following cases, but their obvious import has been accepted by repeated reenactment of Section 1553, Code 1892, Martin *v.* Martin, 84 Miss. 553, 36 So. 523; Moody *v.* Moody, supra; Stevens *v.* Wilbourn, supra; Dickerson *v.* Leslie, 94 Miss. 672, 47 So. 659; Williams *v.* Williams, supra; Tiser *v.* McCain, 113 Miss. 776, 74 So. 660; Miers *v.* Miers, supra; Lackey *v.* Harrington, 162 Miss. 512, 139 So. 313; Medford *v.* Martin, 176 Miss. 188, 168 So. 607. In this connection, Stevens *v.* Wilbourn, supra, is particularly notable in sustaining the right of the widow to an injunction restraining her two adult children from the use and occupation of any part of the homestead.

Many of our cases deal with the immunity of the homestead to sale or disturbance under the claims of creditors. Such charitable protection is dictated by the same consideration which should exempt it from a similar calamity at the hands of the heirs. It is not conceivable that a disruption of the widow's use of the homestead as a haven, or for subsistance, could be less painful or distressing if accomplished at the hands of members of her own family. As stated in Moody *v.* Moody, supra, the rights of the widow are absolute, and "she cannot be called on to account for the use and occupancy, nor forced to purchase the rights of

her co-tenants." The implication is inescapable that the cotenants cannot charge her for her use of the homestead, and one reason why they can neither partition it nor compel her to "buy them off" if because during her lifetime they have no present estate therein to sell. Since they have none, she has all.

The partition prohibited by Section 1412 is not a mere record identification of the several interests therein without any assertion by the co-parceners of their respective rights. It means an actual division of the title with the right of possession thereunder. The extent of the respective interests is fixed by Section 1410. The extent to which such interests may be asserted is listed by Section 1412. The right of the widow has the attributes and incidents of a life estate (Medford *v.* Martin, 176 Miss. 188, 168 So. 607) and the other heirs are vested with a future estate which takes effect in possession at the termination of the preceding estate or interest. 26 A. Jur., "Homestead", Sec. 169, p. 106. The status of cotenancy is recognized, but the usual rights thereunder are made subordinate to the widow's rights of use and occupancy during her life. In line with the purpose of the statute, the immunity from partition, being personal to the widow, is not extended to her grantee. Middleton *v.* Claughton, 77 Miss. 131, 24 So. 963.

Although this is the most important contention presented, we have carefully examined all other assignments of error and find that they are not well taken. The peremptory instructions granted to appellee was proper, and the damage by way of rentals, are not unreasonable.

Affirmed.